



No. 544

U. S. Supreme Court, U. S.  
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# In the Supreme Court

of the

United States

October Term, 1938

THE UNITED STATES OF AMERICA,

vs.

EDWARD H. MARKEN, Trustee of Monte-  
rey Brewing Company, a corporation,  
Bankrupt.

On Certificate From the United States Circuit Court  
of Appeals for the Ninth Circuit.

## Supplemental Brief of Trustee, Appellee

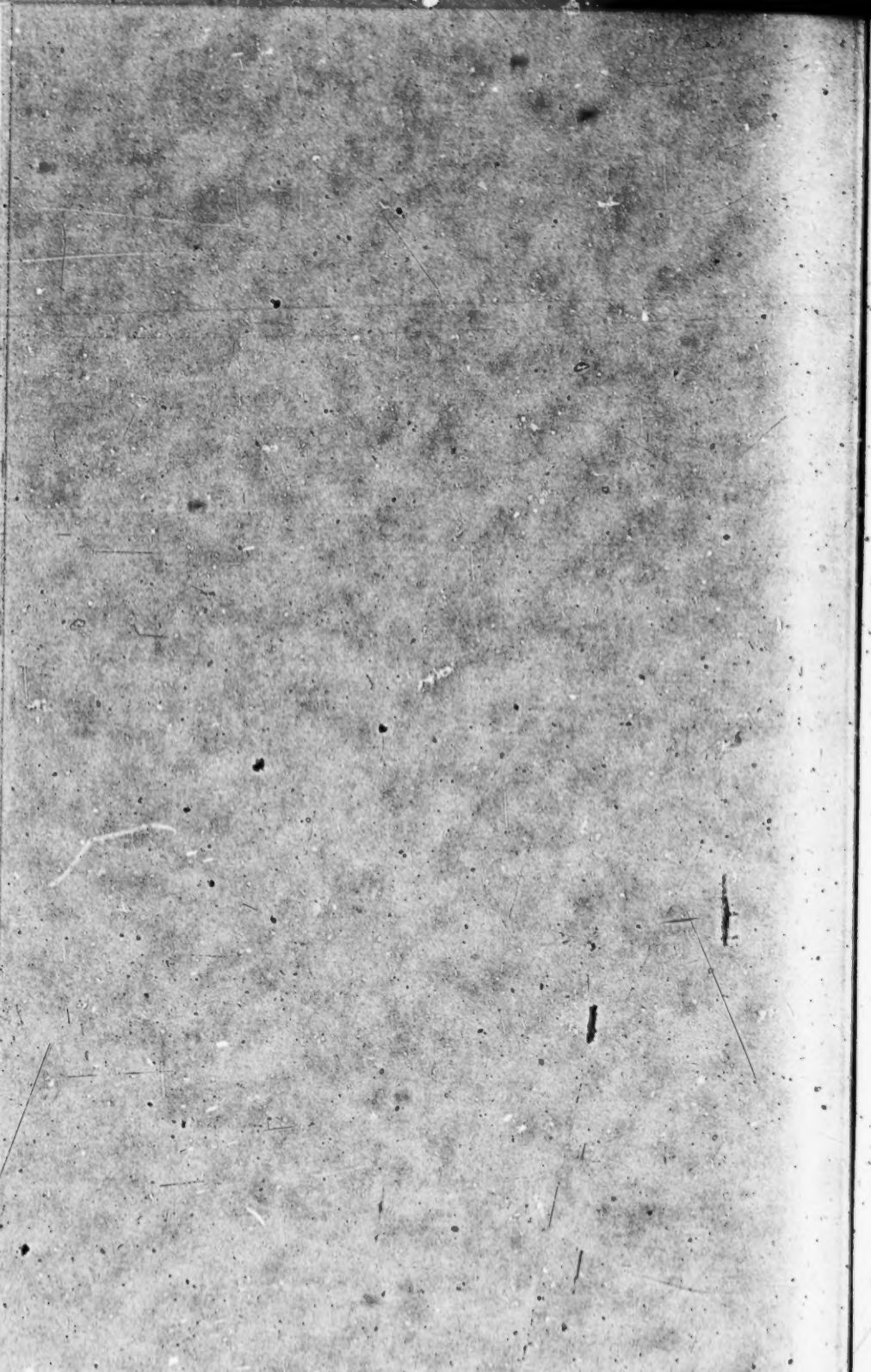
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Due service and receipt of a copy of the within is  
hereby submitted this \_\_\_\_\_ day of March, 1929.

\_\_\_\_\_  
Attorney for \_\_\_\_\_



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**Priority Attaches to the Claim and Not to the  
Claimant**

Our contention that priority is attached to the debt  
and not to the person of the creditor, to the claim and  
not to the claimant is supported by the following cases:

In *Shropshire, Woodliff & Co. v. Bush, et al., Trustees*, 204 U. S. 186; 17 Am. B. R. 77, the Supreme Court of the United States settled this question. Shropshire, Woodliff & Co. had acquired a large number of claims for wages of workmen and servants, none of them exceeding \$300.00 in amount, and all were within three months before the date of the commencement of the proceedings. The District Court disallowed the claims as prior, on the ground that, when filed, they were not due to workmen, clerks or servants. The Circuit Court of Appeals for the Sixth Circuit certified the question to the Supreme Court. In reversing the ruling of the District Court, the Supreme Court of the United States said:

"The precise inquiry is whether the right of prior payment thus conferred is attached to the person or to the claim of the wage earner; if to the person, it is available only to him, if to the claim, it passes with the transfer to the assignee.

Regarding, then, the plain words of the statute, and no more, they (the descriptive words) seem to be merely descriptive of the nature of the debt to which priority is given. When one has incurred a debt for wages due to workmen, clerks or servants, that debt, within the limits of time and amount prescribed by the Act, is entitled to priority of payment. *The priority is attached to the debt and not to the person of the creditor; to the claim and not to the claimant.* The Act does not enumerate classes of creditors and confer upon them the privilege of priority in payment, but, on the other hand, enumerates

classes of debts as 'the debts to have priority.' . . . These debts were exactly within the description of those to which the Bankruptcy Act gives priority of payment, and they did not cease to be within that description by their assignment to another. The character of the debts was fixed when they were incurred and could not be changed by an assignment. They were precisely of one of the classes of debts which the statute says are 'debts to have priority.' "(Parenthetical matter and italics ours.)

In *In re Bennet, Trustee of the Hume Cooperage Co.*, 156 Fed. 173; 18 Am. B. R. 320, the Circuit Court of Appeals for the Sixth Circuit, in discussing the rights of an assignee of a prior claim, said:

"Inasmuch as the contingent right of lien under 2487 does not depend upon the doing of any thing by the creditor, there is no reason why a priority or lien which attaches to the claim rather than the claimant, shall not be assignable."

The court then proceeded to follow the rule laid down in *Shropshire, Woodliff Co. v. Bush*, 204 U. S. 186, also referring to *Trust Co. v. Walker*, 107 U. S. 596, and *Buchanan v. Bowen*, 111 U. S. 776.

There are a multitude of authorities holding that the rights of creditors and the jurisdiction of the Bankruptcy Court *in rem* is acquired as of the date of the filing of the petition. See:

*Acme Harvester Co. v. Beekman*, 222 U. S. 300,  
27 Am. B. R. 262;

*Everett v. Judson*, 228 U. S. 74, 30 Am. B. R. 1;  
*Fairbanks Steam Shovel Co. v. Wills*, 240 U. S.  
 642, 36 Am. B. R. 754;  
*Hiscock v. Varick Bank*, 206 U. S. 28, 18 Am.  
 B. R. 1.

And there are also a multitude of authorities holding that the status of priority is unaffected by assignment, either before or after bankruptcy, which we do not propose to set out at length here.<sup>1</sup>

The case of *Howe v. Sheppard*, 2 Summ. 133, cited by the United States attorney is not in point on the most material fact involved in this proceeding. In the case at bar, at the date of the filing of the petition the bankrupt was not indebted to the United States or to the Federal Housing Administrator acting on behalf of the United States, in any amount at all. It was indebted to the Seaboard National Bank.

In the case of *Howe v. Sheppard*, cited by the Government, the decedent at the time of his death was actually indebted to the United States Government. The facts, as set out in the United States attorney's brief, point out that the judgment against Wood was obtained by Howe and Howard in the sum of \$4,663.31 prior to September, 1830. It was as-

<sup>1</sup>*Matter of Dutcher*, 213 Fed. 908, 32 Am. B. R. 545 (Dist. Ct. Wash.);  
*Fuller v. Bennett*, 152 Fed. 538, 18 Am. B. R. 443 (Dist. Ct. W. Va.);  
*Matter of Harmon*, 128 Fed. 170, 11 Am. B. R. 64 (Dist. Ct. W. Va.);  
*Re Campbell*, 102 Fed. 686, 4 Am. B. R. 535 (Dist. Ct. Wis.);  
*In re North Carolina Car Co.*, 127 Fed. 178, 11 Am. B. R. 588 (Dist. Ct. N. C.);  
*In re Partridge Lumber Co.*, 215 Fed. 973, 33 Am. B. R. 539.

signed to the United States Government in September, 1830. In December, 1830 the United States holding this assignment, brought an action against Wood on the judgment, in the name of Howe and Howard. The action was continued from time to time until October, 1834, at which time Wood died. There is no dispute as to the fact that in October, 1834 when Wood died, he was indebted to the United States Government on a debt which it had owned and held against him in the form of a judgment for a period in excess of three years. Such is not the case here, and we respectfully submit that the case of *Howe v. Sheppard* is not applicable.

### **The Question of Sovereignty**

It seems to be the contention of the Government in this case that for us to assert that the acquisition by the United States Government of certain claims against the estate of a bankrupt and the enforcement of them, to the detriment of other creditors, would be a manifest injustice to other creditors, would be placing a strained construction upon the rule allowing the Government priority. This can be best answered by pointing out that in the case apparently most relied upon by the Government this very thing occurred. We refer to the fact that in the case of *Howe v. Sheppard*, the government, by one means or another, acquired a private judgment which would

have, but for the Government's acquisition of it, been a general claim against his insolvent estate prior to his death and then proceeded to the exclusion of the other creditors, to satisfy itself. In these days of heavy income taxes it is a common thing for the Government to levy on property of income tax payers for unpaid income taxes and heavy penalties. It is not beyond the range of probability that if the rule sought here by the Government is sustained, the Federal Government could levy upon general unsecured claims on file in the bankruptcy proceedings where the estate would pay less than a hundred cents on the dollar, acquire possession of them by virtue of that levy after bankruptcy, and then proceed to enforce them in full against the bankruptcy estate, notwithstanding the fact that at the date of the filing of the petition they were ordinary provable claims. Such a situation is not a mere ephemeral or transitory possibility, but is an ever present probability.

In this day and age the activities of the Federal and State Governments are being expanded daily into the realm of private business to an extent unknown to the common law and unheard of at the time of the foundation of this Government. With rapidly changing economic conditions many of these governmental activities may seem necessary, and the writer of this brief has no desire to criticize or quarrel with this policy. We do, however, believe that where the Government engages in purely private enterprise, such as the lending of money to private borrowers,

the insuring of accounts receivable and of mortgages, and other similar activities, either in aid of or in competition with private banking or insurance business, and permits its funds and property used in connection with such activities, to be taxed by the States, and permits its officers and agents, either individual or corporate, to sue and to be sued, and pays interest on the funds to the agency carrying out the activity, it has so far abdicated its sovereignty in that respect as to place it on a level with the other creditors of the beneficiary of the Government's aid who likewise loans money or delivers merchandise to the debtor.

In *Sloan Shipyards Corp. et al. v. United States Shipping Board Emergency Fleet Corporation et al.*, 258 U. S. 459, 42 Sup. Ct. 386, 48 Am. B. R. 249, the Supreme Court of the United States, speaking through Mr. Justice Holmes, said:

“These provisions sufficiently indicate the enormous powers ultimately given to the Fleet Corporation. They have suggested the argument that it was so far put in place of the sovereign as to share the immunity of the sovereign from suit otherwise than as the sovereign allows. But such a notion is a very dangerous departure from one of the first principles of our system of law. The sovereign properly so called is superior to suit for reasons that often have been explained. But the general rule is that any person within the jurisdiction always is amenable to the law. If he is sued for conduct harmful to the plaintiff his only shield is a constitutional rule of law that exon-

erates him. Supposing the power of the Fleet Corporation *to have been given to a single man*, we doubt if any one would contend that the acts of Congress and the delegations of authority from the President left him any less liable than other grantees of the power of eminent domain to be called upon to defend himself in court. An instrumental~~ity~~ mentality of government he might be and for the greatest ends, but the agent, because he is agent, does not cease to be answerable for his acts. *Osborn v. Bank of United States*, 9 Wheat. 738, *United States v. Lee*, 106 U. S. 196. The opposite notion left some traces in the law (1 Roll. Abr. 95, Action sur Case, T.), but for the most part long has disappeared."

In the *Matter of the Eastern Shore Ship Building Corporation, Bankrupt*, 274 Fed. 893, 48 Am. B. R. 110, ruled upon at the same time by the Supreme Court on certiorari, the United States Circuit Court of Appeals for the Second Circuit, said:

"When the United States enters into commercial business, it abandons its sovereign capacity and is to be treated like any other corporation. Although it absolutely owns the Panama Railroad Company, and is the only person profiting or losing by its activities, still the roadroad company sues and is sued just like any other corporation, in its own name."

Elsewhere in the opinion we find the following significant statement:

“But surely the fact that the Fleet Corporation was employed as an agency of the President does not of itself clothe the agency so employed with the immunities of his office. A bank organized under the National Bank Act and employed by the Secretary of the Treasury under the act as a depository of public money and, to use the language of the act, as ‘a financial agent of the government’ does not on that account lose its character as a private corporation, and does not become immune from suit.”

In both cases the Court held that the Emergency Fleet Corporation's claims were not entitled to priority, notwithstanding the fact that the Emergency Fleet Corporation was admittedly an agency of the government.

In the *United States Bank v. Planters Bank of Georgia*, 9 Wheat. 904, 6 L. Ed. 244, the Supreme Court, speaking through Chief Justice Marshall, said:

“It is, we think, a sound principle that, when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself; and takes the character which belongs to its associates, and to the business which is to be transacted. . . . The state of Georgia, by giving to the bank the capacity to sue and be sued, voluntarily strips itself of

its sovereign character, so far as respects the transactions of the bank, and waives all the privileges of that character."

As was pointed out by the Court in the *matter of the Eastern Shore Ship Building Corporation, Bankrupt, supra*, the government, in the case at bar was and is not engaged in any activities "peculiarly governmental in its nature," but is engaged in an activity which is, to use the words of the Court, "commercial and industrial." This activity is being carried out by an individual agent, namely: "the Federal Housing Administrator on behalf of the United States of America," as the title of this appeal indicates. According to the opinion of the Supreme Court in *Sloan Shipyards Corporation, et al. v. United States Shipping Board Emergency Fleet Corporation, et al.*, though the Federal Housing Administrator may be "an instrumentality of government for the greatest of ends, he is but an agent, does not cease to be answerable for his acts," and is not entitled to priority any more than any other private person.

We would also like to direct the Court's attention to the fact that in the *Sloan Shipyards* case, although there was a dissenting opinion by Chief Justice Taft, concurred in by Mr. Justice Van Devanter and Mr. Justice Clarke, regarding the necessity of bringing action against the Emergency Fleet Corporation in the Court of Claims, the dissenting justices were careful to qualify their dissent so as not to include the ques-

tion of priority. We quote the saving clause in the dissenting opinion:

“As to the preference claimed against a bankrupt in No. 526 by the Fleet Corporation, I concur in the conclusion of the court that it cannot be allowed under the statute as to preferences in bankruptcy because I do not think it extends to claims of the United States *except those for taxes.*”

See, also, *United States v. Wood*, 290 Fed. 109, 1 Am. B. R. (N. S.) 44. Affirmed by the Supreme Court of the United States later in 263 U. S. 680.

### Conclusion

In conclusion our contention is the U. S. did not acquire any greater rights than the Calif. Bank and Appellee feels that the question certified by the United States Circuit Court, Ninth Circuit, to this court should be answered in the negative, and that the claim of the United States of America be denied priority.

Respectfully submitted,

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March, 1939.